

Matter of Highlands Ins. Co. v Ortiz

2007 NY Slip Op 34545(U)

February 8, 2007

Supreme Court, New York County

Docket Number: 109611/2005

Judge: Paul G. Feinman

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

6

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52

-----X
In the Matter of HIGHLANDS INSURANCE
COMPANY, by their t/p/a COUNTRYWIDE
MANAGEMENT SERVICES,

Petitioner,

against

For an Order Staying Arbitration Demanded by
JOEL ORTIZ

Respondent.

- and -

VALERIE MARTINEZ, MARIA RODRIGUEZ,
ALLSTATE INSURANCE COMPANY, STATE
FARM INSURANCE COMPANY, and
STANDARD FIRE INSURANCE COMPANY,
Additional Respondents.
-----X

Index Number 109611/2005
Submission Date Nov. 1, 2006
Mot. Seq. Nos. 003 & 004
Mot. Cal. Nos. 6 & 7

DECISION & ORDER

For Petitioner:
Katherine Jaskot, Esq.
Jaffe & Nohavicka
40 Wall Street, 12th Floor
New York NY 10005
212-809-7800 x 5399

For Respondent:
Scott A. Steinberg, Esq.
Bader Yakaitis & Nonnenmacher, LLP
350 Fifth Avenue
New York NY 10118
212-465-1110

For Additional Respondent Allstate:
Judith Nocella, Esq.
Composto & Composto
142 Joralemon Street, 2d Fl.
Brooklyn NY 11201

For Additional Respondent State Farm:
Stephen P. Burke, Esq.
100 East Carver Street
Huntington NY 11743
631-421-1211

Papers considered in review of these motions to confirm and cross-motions to disaffirm:

<u>Seq. No.</u>	<u>Papers</u>	<u>Numbered</u>
003	Notice of Motion and Affidavits Annexed.....	<u>1</u>
	Notice of Cross-Motion.....	<u>2</u>
	Affirmation in Opposition.....	<u>3</u>
	Affirmation in Support.....	<u>4</u>
	Opposition and Reply Affirmation.....	<u>5</u>
004	Notice of Motion and Affidavits Annexed.....	<u>1</u>
	Notice of Cross-Motion.....	<u>2</u>
	Affirmation in Opposition.....	<u>3</u>

FILED

PAUL GEORGE FEINMAN, J.:

FEB 23 2007

COUNTY CLERK'S OFFICE
NEW YORK

This court, by decision and order dated October 11, 2005, had previously directed a framed-issue hearing to determine whether or not Allstate Insurance Company is the provider of insurance coverage for Maria Rodriguez and whether or not State Farm Insurance Coverage is the provider of insurance coverage for Valerie Martinez.¹ A hearing was held on January 10, 2006 before a Special Referee. The Special Referee's report, dated June 27, 2006, concluded that Allstate never provided insurance coverage for Maria Rodriguez and that State Farm provided insurance coverage for Valerie Martinez only until April 28, 2000, and not thereafter and is not the provider for Martinez for purposes of this litigation.² The referee's report recommended that arbitration be permanently stayed as to Allstate.

Allstate moves pursuant to CPLR 4403 to confirm the referee's report and permanently stay the arbitration as concerns it (motion sequence number 003). Petitioner Highlands Insurance Company separately moves to set aside the referee's report, because although its rights are not affected by a permanent stay of arbitration, it contends that the referee improperly reached her conclusions as evidence in fact showed that State Farm provided insurance for the vehicle or, alternatively, requires Allstate to provide insurance coverage (motion sequence number 004). State Farm cross-moves against both motions seeking to disaffirm the referee's report and to require that Allstate provide insurance coverage to both Rodriguez and Martinez. Respondent

¹The underlying litigation involves a motor vehicle accident on June 18, 2000, involving a vehicle in which Joel Ortiz was a passenger, and the vehicle driven by Valerie Martinez and owned by Maria Rodriguez. Highlands commenced a special proceeding in about June 2005 seeking, among the alternative forms of relief, to permanently stay the arbitration based on the existence of insurance coverage for the adverse vehicle, or a temporary stay pending a framed-issue hearing to determine issues of coverage.

²The Hearing Report is an exhibit to several motion papers, in particular Allstate's Notice of Motion, Exhibit D (hereinafter "Hearing Rep.").

Joel Ortiz joins in support of the opposition to confirming the referee's report and permanently staying the arbitration as concerns Allstate.

For the reasons which follow, Allstate's motion to permanently stay the arbitration is denied. Highlands's motion to set aside the referee's report recommending a permanent stay of the uninsured motorist arbitration as against Allstate and State Farm Insurance Company is granted to the extent set forth below, as are the cross-motions of State Farm for an order disaffirming the report of the Special Referee.

CPLR 4403 provides that upon motion or on its own initiative, a court may confirm or reject, in whole or in part, the report of a referee to report, may make new findings with or without taking additional testimony, or order a new trial or hearing. A referee's report should be confirmed when its findings are supported by the record (*Baker v Kohler*, 28 AD3d 375, 375-376 [1st Dept. 2006], *lv denied* __ NY3d ___, 2006 NY LEXIS 3628 [2006]). The referee's function is to determine the issues presented and to resolve conflicting testimony and matters of credibility, and courts will not generally disturb a referee's findings where the determination is substantiated by the record (*Poster v Poster*, 4 AD3d 145, 145 [1st Dept. 2004]). "The recommendations of a special referee are entitled to great weight because, as the trier of fact, he [sic] has an opportunity to see and hear the witnesses and to observe their demeanor" (*Poster v Poster*, 4 AD3d 145, 145 [1st Dept. 2004], citing, *Frater v Lavine*, 229 A.D.2d 564 [1996]).

Allstate, in seeking to confirm the referee's report and permanently staying arbitration, argues that the referee based her conclusion that Allstate was not the provider of insurance for Rodriguez upon a preponderance of the credible evidence. State Farm's cross-motion argues that the referee's report should be rejected, in large part because Allstate had appeared on behalf of

both Rodriguez and Martinez in a pending lawsuit concerning the same automobile accident in Bronx Supreme Court entitled *Joel Ortiz v Miguel Scroggin et al*, Index No. 6803/2001, and only at the eve of trial in October 2005, did it bring a declaratory action seeking a determination that it was not the insurer for the two women (Burke Aff. in Supp. of Not. of Cross-Mot., unnumb. pp. 2-3; Hearing Tr. 14:21-22; 15:3-15).³ State Farm concedes that it is the excess carrier (Hearing Tr. 12:25-26), but relies on case law which holds that where an insurer has represented a party during the course of litigation, the insurer is estopped from later denying coverage. Although State Farm's attorney presented this argument to the referee, she pointed out that she was only to determine issues of fact (Hearing Tr. 6:20:22; 16:7-26; 17:2-13).

The referee's report sets forth the documentary evidence on which she based her findings and conclusions, including affidavits and investigative reports, as well as the argument from the parties' attorneys. The referee's report concludes that the evidence shows that the Allstate policy number claimed by Rodriguez was never valid, and that Allstate never had a policy covering her. Allstate alleges that it notified Ortiz's attorneys and all parties who may have an interest in the litigation that Rodriguez had no insurance coverage with Allstate (Ref. Rep. p. 4, para. 8). The referee's report also notes that the DMV records show that Martinez once had a vehicle, the registration of which was validated on April 5, 2000 and which was insured by State Farm, with coverage terminated on April 28, 2000, and the plates of which were surrendered to DMV on November 27, 2000 (Ref. Rep. pp. 3-4, para. 3). In addition, the records show that Rodriguez had been involved in four accidents including the one at issue, and her driver's license

³This motion was decided in Allstate's favor, on default (see Allstate Aff. in Opp. [Nocella] Ex. A [*Allstate Ins. Co. v Joel Ortiz, et al.*, Ind. No. 23034/2003 [Sup. Ct., Bronx County, June 2, 2005, Silver J.]).

had been revoked, and that Martinez had also been involved in four accidents within a span of five months, with three in June 2000 (Ref. Rep. p. 5, para. 9). An investigative report suggests that there was fraudulent activity “and possibly complicity with others.” (Ref. Rep. p. 5, para. 9). Based *solely* on the factual evidence, the referee concluded that neither Allstate nor State Farm has a viable insurance policy for either Rodriguez or Martinez.

State Farm argues, seconded by Highlands and Ortiz, that Allstate is estopped from denying coverage to either Rodriguez or Martinez. In *Schiff v Flack*, the Court of Appeals held that “where an insurer, though in fact not obligated to provide coverage, without asserting policy defenses or reserving the privilege to do so, undertakes the defense of the case, in reliance on which the insured suffers the detriment of losing the right to control its own defense,” the doctrine of equitable estoppel will preclude an insurer from arguing a lack of coverage, even where coverage does not exist (51 NY2d 692, 699, citing *O'Dowd v American Sur. Co. of N. Y.*, 3 NY2d 347 []). Thus, in *American Transit Ins. Co. v. Mendon Leasing Co.*, 241 AD2d 436 (1st Dept. 1997), the insurer was estopped from denying coverage where it conceded coverage and provided a defense for four years. In *Indemnity Ins. Co. of No. Amer. v Charter Oak Ins. Co.*, 235 AD2d 521 (2d Dept. 1997), the insurer was estopped from denying coverage on the basis that the accident occurred outside of the policy period because it had assumed the defense for three years without reserving a right to disclaim coverage. (*See also, Hartford Ins. Group v Mello*, 81 AD2d 577 [2d Dept. 1981] [insurer estopped after it provided “complete defense” without any reservation of rights for two years but then sought to disclaim coverage on eve of trial based on argument that liability occurred outside policy period]; *Martini v Lafayette Studios Corp.*, 177 Misc. 2d 383 [Sup. Ct. NY County, 1998] [insurer estopped from denying coverage

where it provided defense for 16 months before disclaiming on basis that liability occurred after policy's expiration]).

Allstate points out that it was granted a judgment on default, never vacated, declaring that it is not the insurer for either Rodriguez or Martinez (Allstate Aff. in Opp. [Nocella] Ex. A [*Allstate Insur. Co. v Ortiz, et al.*, Index No. 23034/2003, Supreme Court, Bronx County [Silver, J.], June 2, 2005]). However, the issue here is not whether Allstate in fact provided insurance coverage but that Allstate *represented* that it was the insurer for nearly five years, as evidenced by the July 31, 2001 letter in response to Ortiz's discovery demands, stating that Allstate provides coverage for both Martinez and Rodriguez, and the letter of August 30, 2004 stating that Rodriguez was insured by Allstate (Steinberg Aff. in Supp., Ex. B, C). Allstate presents no evidence to suggest that it disclaimed coverage but undertook representation nonetheless, or any other factor which would lead to a conclusion that estoppel should not apply in this situation. Instead, it relies on the conclusions of the referee, which were made without considering the import of its years of actual defense representation in the underlying litigation of both women. Moreover, counsel for Ortiz indicates that he was never informed prior to the bringing of the declaratory judgment action, despite Allstate's representation to the referee otherwise, that Allstate did not provide coverage (Steinberg Aff. in Supp. ¶¶ 36, 43). Certainly the prejudice to Ortiz is significant after this length of time (*Presbyterian Hosp. v Maryland Cas. Co.*, 90 NY2d 274, 284 [1997]; *American Transit Ins. Co. v Mendon Leasing Co.*, 241 AD2d 436).

Accordingly, Allstate's motion to confirm the referee's report and for a permanent stay of arbitration is denied. The cross-motions seeking to disaffirm the referee's report are granted to the extent set forth above but otherwise denied.

As noted in the court's decision of October 11, 2005, this framed issue hearing was conducted as a preliminary to the final determination of the petition brought by Highlands. The court directs Allstate and State Farm, if it wishes, to proffer an answer to the petition within 20 days of the date of entry of this decision and order, after which a final determination can be rendered on the petition. After an answer is filed and/or the time for same has lapsed, any of the parties may move for entry of a final judgment. Therefore it is,

ORDERED that the motion bearing sequence number 003 to confirm the referee's report of June 27, 2006 is denied and the cross-motion is granted to the extent that the referee's report is rejected as set forth above and is otherwise denied; and it is further

ORDERED that the motion and cross-motion bearing sequence number 004 to disaffirm the referee's report of June 27, 2006 and to permanently stay arbitration is granted to the extent of rejecting the referee's report as set forth above and is otherwise denied, and it is further

ORDERED that Allstate and State Farm, if they have not and so desire, are to serve and file an answer to the petition within 20 days of the date of entry of this decision and order; and it is further

ORDERED that any party may move on notice for entry of final judgment on this petition and shall requisition the complete County Clerk's file including the original petition and any answers once the 20 day period to answer has elapsed.

The foregoing shall constitute the decision and order of the court in motions bearing sequence numbers 003 and 004.

Dated: Feb. 8, 2007
New York, New York



FILED

FEB 23 2007

**COUNTY CLERK'S OFFICE
NEW YORK**